IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY (Appellant),

Respondent.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

THE OHIO OIL COMPANY (Appellant),

Respondent.

## BRIEF

**In Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.**

THOMAS H. COBBS,
CRAIG VAN METER,
WILLIAM H. ARMSTRONG,
FRED H. KELLY,
Attorneys for Respondents.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

## INDEX.


| | Page |
|---|---|
| Statement of the case | 1 |
| Summary of argument | 4 |
| Argument | 7 |
| No grounds exist which would justify the exercise by this Court of its power to grant a writ of certiorari | 7 |
| I. This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari | 7 |
| II. The Court of Appeals in rendering its opinion disregarded no controlling Illinois decisions | 8 |
| III. The petition presents no important jurisdictional question arising under the Federal Bankruptcy Act | 12 |
| IV. The opinion is not in conflict with a decision of the Circuit Court of Appeals of the Fifth Circuit, and, even if it is, that would not justify certiorari because the decisions involve questions of local law of different States | 17 |
| Conclusion | 19 |


### Cases Cited.


Branch v. Central Trust Co., 320 Ill. 432-440, 151 N. E. 284 ..... 9, 13

Erie Railroad Co. v. Tompkins, 304 U. S. 64 ..... 18

First National Bank v. Conway, 94 Fed. (2nd) 736, cert. den. 304 U. S. 578 ..... 5, 14

In re Prima Company, 98 Fed. (2nd) 952, cert. den. 305 U. S. 658 ..... 5, 14

Kern River Co. v. U. S., 257 U. S. 147-151 ..... 12
Kynerd v. Hulen, 5 Fed. (2d) 160 ..... 17
Lion Bonding & Surety Co. v. Karatz, 262 U. S. 640 .. 6
Pennsylvania R. R. Co. v. Hummell, 44 Pa. 375, 84 Am. Dec. 457 ..... 13
Rio Grande Western Ry. Co. v. Stringham, 239 U. S. 44, 47 ..... 12
Ruhlin v. New York Life Ins. Co., 304 U. S. 202 ..... 6, 19
Thompson v. Terminal Shares, 104 Fed. (2nd) 1, cert. den. cases 219, 180, Oct. 6, 1939 ..... 5, 14, 15
Tomlinson v. Thompson, cert. den. 306 U. S. 652 ..... 15
Transcontinental Oil Co. v. Emmerson, 298 Ill. 394, 131 N. E. 645 ..... 13
Traubel-Scott-Kitzmiller Co., Inc., v. Fox et al., 264 U. S. 426 ..... 5, 14
Waller v. Hildebrecht, 295 Ill. 116-121, 128 N. E. 807 .. 10
Western Union v. Penn. R. R. Co., 195 U. S. 540-570 .. 12

**Statutes Cited.**

Bankruptcy Act, Sec. 77 (11 U. S. C. A., Sec. 205) .... 1, 5
Bankruptcy Act, Sec. 77B (11 U. S. C. A., Sec. 207) .. 5
Judicial Code, Sec. 240 (a) (28 U. S. C. A. 347a) .... 4, 7

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY (Appellant),

Respondent.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

THE OHIO OIL COMPANY (Appellant),

Respondent.

## BRIEF

**In Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.**

### STATEMENT OF THE CASE.

Respondents deem it advisable to make a brief additional statement in order to bring before this Court the issues presented by the petition.

This controversy arises in a summary proceeding under Section 77 of the Bankruptcy Act (*11 U. S. C. A. 205*), for the reorganization of the Missouri Pacific Railroad Co.,

Debtor, and Missouri-Illinois Railroad Co., Subsidiary Debtor.

The Trustee (Petitioner here) filed a petition with the Reorganization Court, the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, which, in its essence, was a petition to quiet title to a part of the railroad right of way of the Subsidiary Debtor, Missouri-Illinois Railroad Company, located in Illinois.

The Trustee had succeeded to the title, of the Subsidiary Debtor, to the right of way which had been conveyed to predecessors of the Subsidiary Debtor by right of way deeds, two of which were dated in August, 1896, and one in January, 1898.

It was contended by the Trustee that these deeds conveyed to his predecessors in title the fee to the property in question. The provisions of these deeds, and, in particular, the granting clauses thereof, which are substantially the same, are set forth in the Trustee's petition (Tr. of R. 4-5), and in the opinion of the Circuit Court of Appeals (Tr. of R. 167). For the Court's convenience, we set forth the granting clause of the first deed as follows:

> "A strip of land for right of way for said railroad company sixty feet wide over and across the southwest quarter (¼) of the northeast quarter (¼) of section twenty (20), township two (2) north, range two (2) east of the third Principal Meridian" (Tr. of R. 167).

Respondents, who had served notice of their claim to the ownership of the oil and mineral rights in and underlying said premises (Tr. of R. 3-4), were notified by registered mail of the filing of the petition and directed to appear and be heard at the time of the presentation thereof (Tr. of R. 57).

Respondents appeared and filed answers to the Trustee's petition, contesting the jurisdiction of the Reorganization Court to adjudicate the question of title and to grant the Trustee the relief prayed for, on the ground that the deeds under which the Trustee claimed title conveyed no more than an easement or right of way for railroad purposes, and that they, by virtue of certain oil leases from the fee owners, were vested with title to all the oil and mineral rights under the right of way, and further challenged the jurisdiction of the Reorganization Court to grant the Trustee the requested power of a receiver *pendente lite* and the authority to drill on said right of way and to remove, conserve and market the oil and gas from said premises and out of the proceeds of the oil recovered to pay such expenses (Tr. of R. 38-56).

The Reorganization Court, after a hearing, found that the Trustee was in possession of and was vested with title to said oil and gas, and granted the Trustee all the relief prayed, vesting him with the powers of a receiver *pendente lite* without bond, and authorizing him to drill, market and sell the oil and to pay all expenses out of the proceeds thereof, and enjoining Respondents from asserting any rights or claims to the oil and gas other than in the reorganization proceedings and from interfering with the drilling of the wells and marketing the oil (Tr. of R. 57-60).

Upon appeal to the United States Circuit Court of Appeals that Court held, in accordance with the contentions of Respondents, that said deeds granted only a right-of-way easement to the railroad company; therefore, it appeared on the face of the petition that the Trustee had no possession, actual or constructive, of the oil and gas rights, and that consequently the Court was without jurisdiction to enter the order. The case is reported *106 F.* (2nd) *217*.

## SUMMARY OF ARGUMENT.

NO GROUNDS EXIST WHICH WOULD JUSTIFY THE EXERCISE BY THIS COURT OF ITS POWER TO GRANT A WRIT OF CERTIORARI.

I.

**This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.**

Under well-established principles the power of this Court in granting writs of certiorari under Section 240 (a) of the Judicial Code (28 U. S. C. A. 347a) is to be exercised only when there are special and important reasons therefor.

The petition presents no questions of gravity or importance because of the legal, economic or social problems involved. The amount in controversy, as suggested by petitioner (Br. 9), is no criterion by which the importance of litigation is measured in order to justify this Court's issuance of its writ of certiorari.

II

**The Court of Appeals, in rendering its opinion, disregarded no controlling Illinois decisions.**

The railroad right of way in question is located in the State of Illinois, and it was recognized by the Court of Appeals and by the litigants that their respective interests in the property should be determined by the statutory and case law of that State. However, there is no Illinois decision in which a deed has been construed where the granting clause is identical with that found in those deeds. Under such circumstances the Court of Appeals

followed established judicial precedents in analyzing the issues, and in reaching its decision it was controlled and guided by the applicable Illinois law of conveyancing (Tr. of R. 173-176), and the Illinois cases upon which Petitioner relies were considered and distinguished (Tr. of R. 177-180).

## III.

**The petition presents no important jurisdictional question arising under the Federal Bankruptcy Act.**

(1) A United States District Court handling a reorganization of a railroad under Section 77 of the Bankruptcy Act (11 U. S. C. A. 205), is essentially a Bankruptcy Court with the same jurisdiction as to the bankrupt and its property (*Thompson v. Terminal Shares*, 104 Fed. [2nd] 1; cert. den. cases 219, 180, Oct. 6, 1939).

The same is true of a Reorganization Court acting under Section 77b (*In re Prima Company*, 98 Fed. [2nd] 952, cert. den. 305 U. S. 658; *First National Bank v. Conway*, 94 Fed. [2nd] 736, cert. den. 304 U. S. 578).

The jurisdiction of an ordinary Court of Bankruptcy over the bankrupt and his property has been repeatedly held to exclude jurisdiction concerning property not in the actual or constructive possession of the Trustee, and such Court has no jurisdiction to adjudicate adversary claims to the title to property, without consent, not in the actual or constructive possession of the Trustee (*Traubel-Scott-Kitzmiller Co., Inc., v. Fox et al.*, 264 U. S. 426).

There is no public policy or compelling reasons to grant to a Reorganization Court, under Section 77, a greater quantum of jurisdiction to adjudicate controversies relating to property than an ordinary Bankruptcy Court would have.

(2) The Circuit Court of Appeals did not rule in its decision, as suggested by Petitioner, that a Bankruptcy Court does not have the right as a preliminary inquiry to determine its own jurisdiction.

The Court of Appeals expressly recognized this principle (Tr. of R. 172-173). However, in this instance, the want of jurisdiction appeared on the face of the petition itself, that is, in the deeds on which Trustee's claims were predicated. No further inquiry was needed. Consequently, the Reorganization Court's proceedings, rulings and findings, when the lack of jurisdiction thus appeared, were void and a nullity (*Lion Bonding & Surety Co. v. Karatz*, 262 U. S. 640).

IV.

**The opinion is not in conflict with a decision of the Circuit Court of Appeals of the Fifth Circuit, and, even if it is, that would not justify certiorari because the decisions involve questions of local law of different States.**

If there is a conflict (which Respondents deny), "the conflict may be merely corollary to a permissible difference of opinion in the State Courts" (*Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202), and, therefore, not a ground for certiorari.

## ARGUMENT.

### NO GROUNDS EXIST WHICH WOULD JUSTIFY THE EXERCISE BY THIS COURT OF ITS POWER TO GRANT A WRIT OF CERTIORARI.

#### I.

**This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.**

Under well-established principles, the power of this Court to grant writs of certiorari under Section 240 (a) of the Judicial Code (28 U. S. C. A. 347a) rests in the discretion of the Court. As has been many times declared, this is a power to be exercised sparingly, and only in cases where there are special and important reasons therefor, or in order to secure uniformity of decisions.

That these cases, which were submitted and decided in the Court of Appeals, are not of sufficient gravity or general importance to justify the exercise of the power to grant a writ of certiorari is apparent from the petition. In the final analysis the controversy is one between the Trustee in a railroad reorganization, who is reaching out under the color of railroad right-of-way deeds executed in 1896, to engage in exploring, drilling and selling oil in competition with private corporations chartered for that purpose, who have oil leases on the same property. This is just a private suit over the title to property.

No important legal, economic or social problem is involved. The mere fact that a large sum of money is involved, which the petition suggests entirely outside of the record (Br. 9), does not transform a controversy between private litigants, decided upon ordinary principles of law, into a cause of special importance or gravity beyond the importance to the litigants themselves.

II.

**The Court of Appeals in rendering its opinion disregarded no controlling Illinois decisions.**

One of the principal grounds that Petitioner urges for the issuance of a writ of certiorari is that the decision of the Court of Appeals failed to follow controlling Illinois decisions.

The railroad right of way in question is located in the State of Illinois, and it was recognized by the Court of Appeals and by the litigants that their respective interests in the property should be determined by the statutory and case law of that State (Tr. of R. 173). However, no Illinois decision was found in which a deed had been construed by the courts of that State where the granting clause was identical with that found in these deeds. Under such circumstances the Court of Appeals had no alternative but to analyze the issues, and, in reaching a decision, be controlled and guided by the adjudicated principles of Illinois law of conveyancing.

Respondents believe that this Court will be impressed by the painstaking care employed by the Court of Appeals in considering and following the Illinois law and in distinguishing the cases relied upon by Petitioner both in this Court and in the Court of Appeals.

Petitioner, in his petition and brief in this Court, cites no new cases, nor does he advance any contentions other than those previously presented to the Court of Appeals. He concedes that the Court of Appeals considered and distinguished the Illinois decisions cited by him, but he now asks for a reargument in this Court of the same issues on the same authorities which were presented to and argued in the Court of Appeals. In other words, in its essence, this point is an attempt to make certiorari perform the office of a further appeal on the same question.

This is not within the contemplation of the rules or the decisions of this Court applying to certiorari.

In view of the able opinion of the Court of Appeals, it would be an imposition and a burden upon this Court to reanalyze, rediscuss and reargue the Illinois law on this subject. It is ably collated and summarized in the opinion of the Court of Appeals (Tr. of R. 173-180).

It is important to note, however, that in arriving at its decision the Court of Appeals recognized the doctrine that the cardinal principle of construction should be to give effect to the intent of the grantor, as it may be collected from the whole instrument. The Court of Appeals also was controlled by the general principle of construction followed by the courts of Illinois in construing right-of-way deeds, as expressed by the Supreme Court of that State in the case of *Branch v. Central Trust Co.*, 320 Ill. 432-440, 151 N. E. 284. In that case the Supreme Court of Illinois, on pages 440-442 of the opinion, said:

> "The grant to a railroad company of a right of way over, through and upon land described does not convey the fee to any part of the land described, but only the right to use the land for railroad right-of-way purposes. * * * These cases make it clear that in this State a grant of a right of way to a railroad company does not convey a fee in the land, but conveys an easement, only * * *."

After a thorough consideration of the deeds and of the Illinois cases and rules of construction, the Court of Appeals arrived at the conclusion, which is evident, that in each deed the "clear intent, expressly stated, was to convey to the railroad company only a right-of-way easement for its railroad, and not a fee" (Tr. of R. 176).

In addition to contending that the Court of Appeals did not follow certain cases (Br. 10), which were expressly considered and distinguished (Tr. of R. 178-180), Peti-

tioner complains that the Court of Appeals improperly gave weight to the case of *Waller v. Hildebrecht*, 295 Ill. 116-121, 128 N. E. 807. In that case the Supreme Court of Illinois held that in construing instruments of the character of the deeds in question the Court will look to the circumstances attending the transaction, the situation of the parties, the state of the thing granted, and the object to be attained, in order to ascertain and give effect to the intention of the parties. In that case the further rule was announced that where a particular or special right or easement in land is conveyed, which may well coexist and be enjoyed and used by the grantee concurrently with the ownership of the fee by the grantor, the fee does not pass, because it is not essential to the right or interest which is described in the deed.

This ruling is most pertinent to the case at bar, because at the time of these original conveyances the circumstances were that a railroad right of way was to be obtained and the railroad track built over and across the property. That was all that was in the contemplation of the parties. It was not necessary then, nor is it now, for the enjoyment of the right to operate the railroad over and across this land, that the fee in the land should pass. Petitioner never did, and does not now, show any reason why the grant should be enlarged beyond the original intention of the parties, or why there is any distinction between the conveyance of a right of way and the conveyance for a right of way.

Petitioner seems to contend that the decisions of Illinois required the Court of Appeals to delete or disregard the words "for right of way for said railroad company" and the words "over and across," which were used in the granting clause of the right-of-way deeds. The grant, with these words deleted, would read, "a strip of land * * * sixty feet wide * * * the Southwest Quarter (¼) of the

Northeast Quarter (¼) of Sec. 20." It will be readily observed that the words "over and across" are absolutely essential to complete the description of the property granted, and without them there would be no grant.

The Court of Appeals, in following these authorities, correctly ruled "that the language used to describe the easement is apt and appropriate for that purpose and no other. It designates the land to be subject to the use—'a strip of land sixty feet wide * * * over and across'; it describes the use permitted—'for a right of way for said railroad.' This language made it perfectly clear that the parties met for the sole purpose of contracting for a railroad right of way" (Tr. of R. 176).

Petitioner asserts that the reasoning of the Court of Appeals is fallacious in making a distinction between cases where it is held that the use of certain language constitutes a condition subsequent so that the property reverts to the grantor on condition broken and cases involving the question of whether or not certain language should be construed to convey a fee or only an easement. However, no reason whatever is given for such assertion, and it seems obvious to Respondents, as it did to the Court of Appeals, that there is a clear distinction between those cases.

The rules and decisions of this Court only contemplate the exercise of its power to grant certiorari when a Court of Appeals has failed to follow controlling local law, and not when the Court of Appeals has decided adversely to one party's contention. The writ of certiorari is no substitute for an appeal, as Petitioner in effect argues.

## III.

**The petition presents no important jurisdictional question arising under the Federal Bankruptcy Act.**

(1) The second principal ground urged by Petitioner, for the granting of the writ prayed for, is that, assuming that the Court of Appeals properly decided that the Trustee had no more than an easement for railroad purposes, then there are presented important jurisdictional questions arising under the Federal Bankruptcy Act.

The contentions of Petitioner on these points are somewhat obscure. It is apparent, contrary to Petitioner's suggestions, that adverse possession has nothing to do with the case. The jurisdictional question is whether the Trustee had actual or constructive possession of the oil and gas underlying the right of way, regardless of the manner in which the possession was acquired.

Petitioner argues that a railroad easement constitutes possession of both the surface and the sub-soil, and in support of said contention cites *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, 47; *Kern River Co. v. U. S.*, 257 U. S. 147-151, and *Western Union v. Penn. R. R. Co.*, 195 U. S. 540-570. These cases and the argument now advanced were fully considered and disposed of by the Court of Appeals. It is pointed out by the Court of Appeals in the opinion that even if the grant of a railroad right of way gave a right to the exclusive use of the surface for railroad purposes it would not give a fee title to the oil and gas several hundred feet below the surface, and that, in any event, the extracting and selling of oil and gas is not an element of use of a railroad right of way.

In the quotation from *Western Union v. Penn. R. Co.*, 195 U. S. 540-570, appearing on page 15 of the brief, counsel do not quote enough to indicate what this Court meant when it stated that a railroad right of way was

more than an easement. On the same page quoted from, this Court goes on to cite with approval the case of *Pennsylvania R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457, where it is said:

> "It is a fee in the surface and so much beneath as may be necessary for support * * *.'"

It is, therefore, clear that this Court simply meant that a railroad may own the fee in the surface of its right of way, plus as much beneath the surface as may be necessary for the support thereof. No one would contend that for this purpose the railroad company needed or intended to acquire the right to the oil and gas under its right of way.

Furthermore, the Court of Appeals was bound to follow the decisions of Illinois, even if there had been some prior decisions of this Court to the contrary. In the case of *Branch v. Central Trust Co.*, 320 Ill. 432-442, where a railroad right of way was conveyed, it was expressly held that in Illinois a grant of a right of way to a railroad company does not convey a fee, but only conveys an easement. That decision was properly followed by the Court of Appeals. Furthermore, the Supreme Court of Illinois in the case of *Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394, 131 N. E. 645, has recognized that the owner of an easement has no right to participate in the profits of the soil charged with an easement.

Petitioner apparently further argues that, notwithstanding this established law, a Trustee, acting under Section 77, in a proceeding to reorganize a railroad, would, by virtue of his possession of a surface easement for railroad purposes, have sufficient possession of the sub-soil, oil and minerals lying underneath, to confer jurisdiction on the Reorganization Court in a summary proceeding to adjudicate questions of title.

A United States District Court handling a reorganization of a railroad under Section 77 of the Bankruptcy Act is essentially acting as an ordinary Bankruptcy Court with the same jurisdiction, with respect to the bankrupt and its property (*Thompson v. Terminal Shares*, 104 Fed. [2nd] 1, cert. den. cases Nos. 219, 180, Oct. 6, 1939). The same is true of a Reorganization Court acting under Section 77-B (*In re Prima Co.*; 98 Fed. [2nd] 952, cert. den. 305 U. S. 658; *First Nat. Bank v. Conway*, 94 Fed. [2nd] 736, cert. den. 304 U. S. 578).

The jurisdictional provisions of Section 77-B are identical with Section 77, as amended in 1935, with respect to the jurisdiction of the Reorganization Courts (*Thompson v. Terminal Shares*, 104 Fed. [2nd] 1, cert. den. cases 219, 180, Oct. 6, 1939).

Consequently, a Reorganization Court, whether it be a railroad reorganization under Section 77 or a corporate reorganization under Section 77-B, has the same jurisdiction as an ordinary Court of Bankruptcy over the bankrupt and its property.

The jurisdiction of a Court of Bankruptcy over the bankrupt and his property has been repeatedly held to exclude jurisdiction concerning property not in the actual or constructive possession of the Trustee, and such Court has no jurisdiction to adjudicate adverse claims to the title to property, without consent, which is not in the actual or constructive possession of the Trustee (*Traubel-Scott-Kitzmiller Co., Inc., v. Fox et al.*, 264 U. S. 426).

In this same reorganization proceedings the Trustee contended, in the case of *Thompson v. Terminal Shares, Inc., supra*, that under Section 77 as amended the Reorganization Court had been granted a broader jurisdiction to proceed *in personam* than an ordinary Bankruptcy Court. This contention was decided adversely in the *Thompson* case by the United States Circuit Court of Appeals for

the Eighth Circuit, and this Court denied certiorari both prior to and after the decision of the Circuit Court of Appeals (*Tomlinson v. Thompson*, cert. den. 306 U. S. 652; *Thompson v. Terminal Shares, Inc.*, cert. den. cases 219, 180, Oct. 6, 1939.

In this petition the same Trustee is again contending that, because he is acting as a Trustee in the reorganization of a railroad under Section 77, the Reorganization Court should have a broader grant of power as to its jurisdiction over property than granted to ordinary Courts of Bankruptcy, namely, that the Reorganization Courts may, without consent, adjudicate adverse claims to title to property even though the same may not be in the actual or constructive possession of the Trustee. Petitioner cites no authority to support this contention, nor does he set forth any compelling argument based upon public policy or necessity.

If the *in personam* jurisdiction has not been expanded, it follows that the jurisdiction to adjudicate adverse claims to property, not in the possession of the Trustee and without the consent of the parties, should not be expanded beyond that of an ordinary Bankruptcy Court. There is no more reason why the Reorganization Court should have jurisdiction to settle questions of title to property, not belonging to or in the possession of the Trustee, in a railroad reorganization proceeding than it should have the power to enforce its process to bring persons from foreign jurisdictions into its court to adjudicate personal liability.

Consequently, the Court of Appeals was following a well-established precedent when it ruled that the Reorganization Court had no jurisdiction to adjudicate the questions of title involved, unless the Trustee was in actual or constructive possession of the property in dispute, that is, the oil and gas and mineral deposits.

Under the issues it was necessary, in determining the jurisdictional question, to decide the interest of the Trustee created by the deeds in question. Once it determined that these deeds granted only an easement for railroad purposes, and hence no right, title or interest in the underlying oil and gas, it then followed, under established bankruptcy principles, that the Reorganization Court had no jurisdiction and hence its findings, orders and decisions were void.

(2) A further jurisdictional question, urged by Petitioner, is to the effect that the Court of Appeals failed to consider the right of the Reorganization Court, in the first instance, to determine its own jurisdiction to entertain the proceedings.

In this we believe Petitioner is in error. The Court of Appeals recognized that the first problem confronting that Court, as well as the Reorganization Court, was to determine its jurisdiction to entertain the proceedings (Tr. of R. 171, 173).

Under the issues presented to the Reorganization Court the question of jurisdiction depended upon the interest to which the Trustee had succeeded by virtue of the right-of-way deeds. The granting clause of these deeds appeared on the face of the petition. Consequently, the lack or want of jurisdiction was thus apparent without more.

The Reorganization Court, in granting the relief prayed, held that the deeds in question conveyed a fee simple title to, and not an easement in, the strips of land described in the deeds. Thus the Reorganization Court thereby determined its jurisdiction, albeit, erroneously, as the Court of Appeals subsequently found. Since the basis of its jurisdiction was determined erroneously, it then followed that all of its orders and findings, as well as its decision, were null and void.

The contention here urged by Petitioner is further inapplicable because, at the time of the hearing, all parties were permitted to submit any and all evidence that they desired on the issues. If Petitioner desired to submit to the Court other evidence than that contained in the deeds, the opportunity was afforded. That the construction of the deeds would be determinative not only of jurisdiction, but of the rights of the parties, was thoroughly recognized by Petitioner's counsel. At the opening of the hearing in the Reorganization Court, counsel in effect so advised the Court (Tr. of R. 119, 120, 121).

Consequently, every opportunity was afforded Petitioner to present evidence on the question of jurisdiction. However, he decided to rely upon the wording of the deeds set out in the petition. Therefore he cannot now complain that the Reorganization Court did not have an opportunity to and did not determine its own jurisdiction. It, however, determined it erroneously.

## IV.

**The opinion is not in conflict with a decision of the Circuit Court of Appeals of the Fifth Circuit, and, even if it is, that would not justify certiorari because the decisions involve questions of local law of different States.**

As a final ground for the issuance of certiorari, Petitioner contends that the decision of the Court of Appeals is in conflict with a decision of the Fifth Circuit, referring particularly to the case of *Kynerd v. Hulen*, 5 Fed. (2d) 160. Respondents believe that there is no conflict, and that the cases are clearly distinguishable. In the Kynerd case the deed did not anywhere purport to convey a right of way or a strip of ground for a right of way. It nowhere contained in the granting clause the language "for a right of way for said railroad company,"

or any similar language, as is true of the deeds in the case at bar. Furthermore, the words "upon, over and across" in the deed before the Court in the Kynerd case referred to the railroad track and not to the land granted. The land granted was described by metes and bounds. In the deeds in the present case there can be no question but that the words "over and across" refer to the land granted. The deeds unequivocally grant "a strip of ground for right of way for said railroad company 60 feet wide over and across" the land described. The exact location of the 60-foot strip "over and across" the land was not given. The location of that strip "over and across" the land was left to the railroad company. However, it had to be located "over and across" the land described. This necessarily limited the grant to an easement over and across and not a conveyance of the fee as was the situation in the Kynerd case. Therefore, it is manifest that, because of the difference between the two deeds, there is no real similarity between the two cases and hence no conflict.

Also, the Kynerd case involved questions relating to real estate located in Texas. The Federal Courts have always followed the laws of the several states as to questions of title to real property. If there is a conflict between the Kynerd case and the instant case, which Respondents do not admit, it may well be due to the difference between the conveyancing laws of the State of Illinois and those of the State of Texas, and hence not be a basis for certiorari.

Since the decision of this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, overruling the doctrine of Swift v. Tyson, the Federal Courts also follow the law of the several states as to all other controversies arising under the laws of the several states. It is conceivable that the various Courts of Appeal, in applying the law of the several

states, may render conflicting decisions upon the same or similar facts. Under such circumstances a conflict between opinions of the Courts of Appeal in cases involving the state law of the several states as to both real estate and commercial transactions will not, without more, justify certiorari. As was pointed out by this Court in the case of *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, "the conflict may be merely corollary to a permissible difference of opinion in the State Courts."

## CONCLUSION.

The Court of Appeals properly reversed the District Court, and, in so doing, followed established judicial precedent.

It is therefore respectfully submitted that the petition presents no grounds which would justify the exercise by this Court of its power to grant a writ of certiorari.

Respectfully submitted,

THOMAS H. COBBS,
CRAIG VAN METER,
WILLIAM H. ARMSTRONG,
FRED H. KELLY,
Attorneys for Respondents.